

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LARRY J. VILLANI, OFFICER OF :
CATARACT LUMBER AND :
HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

In the Matter of the Petition :
of :
KURT M. VILLANI, OFFICER OF :
CATARACT LUMBER AND :
HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

DETERMINATION

DTA NOS. 804437,
804438 AND 804439

In the Matter of the Petition :
of :
JAMES M. VILLANI, OFFICER OF :
CATARACT LUMBER AND :
HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

Petitioner Larry J. Villani, officer of Cataract Lumber & Home Center, Inc., 8955
Rivershore Drive, Niagara Falls, New York 14304 filed a petition for revision of determinations
or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period

September 1, 1983 through September 23, 1986.

Petitioner Kurt M. Villani, officer of Cataract Lumber & Home Center, Inc., 50 Islewood, Grand Island, New York 14072 filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through September 23, 1986.

Petitioner James M. Villani, Officer of Cataract Lumber & Home Center, Inc., 1696 Jane Drive, Niagara Falls, New York 14304 filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through September 23, 1986.

A consolidated hearing was commenced before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on March 13, 1991 at 9:15 A.M. and continued to conclusion before Jean Corigliano, Administrative Law Judge, on January 14, 1992 at 9:15 A.M., with all evidence and briefs to be submitted by June 16, 1992. Petitioners Kurt M. Villani and Larry J. Villani filed briefs on April 27, 1992 and June 15, 1992 and submitted a supplement to their briefs on June 18, 1992. The Division of Taxation submitted a brief on June 2, 1992 and submitted a supplement to its brief on June 26, 1992. Petitioner James M. Villani did not submit a brief. Petitioner James M. Villani appeared by Donald L. Summer, Esq. Petitioners Kurt M. Villani and Larry J. Villani appeared by Anthony D. Parone, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioners were persons required to collect sales and use taxes on behalf of Cataract Lumber & Home Center, Inc., and, as a consequence, liable for sales and use taxes due from that corporation.

FINDINGS OF FACT

On April 8, 1986, the Division of Taxation ("Division") issued to petitioners, Larry J. Villani, Kurt M. Villani and James M. Villani, separate notices of determination and demands

for payment of sales and use taxes due for the period September 1, 1984 through February 28, 1986, assessing each petitioner sales and use taxes in the amount of \$122,864.33 plus penalty and interest.

On December 23, 1986, the Division issued to petitioners separate notices of determination and demands for payment of sales and use taxes due for the period September 1, 1983 through September 23, 1986, assessing each petitioner for taxes due in the amount of \$134,622.22 plus penalty and interest.

The tax assessed by the April 1986 notices of determination was based upon sales tax returns filed by Cataract Lumber & Home Center, Inc. ("Cataract") without full payment of the tax shown as due on those returns. The December 1986 notice of determination was issued as a result of a sales tax field audit of Cataract's books and records. Petitioners were deemed by the Division to be personally liable for taxes determined to be due from Cataract based primarily upon their status as officers and shareholders of Cataract.

Cataract was a supplier of lumber, hardware and other building supplies, operating a retail store in Niagara Falls, New York, and also selling and delivering materials to the building trade. The business was started after World War II by Guido J. Villani, petitioners' father. In 1976, Guido Villani asked his oldest son, Robert, to take over operation of the business, which he did. Under Robert's direction Cataract expanded, opening up a second retail store in Clarence, New York in the summer of 1984. Financial strains caused by the expansion and by a fire in the Clarence store eventually forced Cataract into bankruptcy. By the end of January 1987 the assets of the business were in the possession of M & T Bank, and the business was no longer operating.

Each of the Villani brothers (Robert, Larry, Kurt, and James) was raised in the business by his father. Larry Villani began working full time at Cataract in 1969, after completing his military service. Kurt went to work for Cataract right after finishing high school in 1970. James began working for Cataract in the early 1970's. Cataract was incorporated in 1973. Its original certificate of incorporation was signed by Guido, Larry and Kurt on December 19,

1973. An amendment to the certificate of incorporation was filed in 1981 and signed by Robert and Kurt.¹

Robert Villani attended college and took courses in business and accounting. In 1966, he began working for National Fuel Gas where he remained until his father became ill sometime in 1976. At that time, Guido asked his oldest son to give up his employment with National Fuel Gas and return to Cataract to operate the family business. Until his illness, Guido was in complete control of Cataract. When Robert entered the business, Guido instructed his younger sons to treat Robert as the head of the family

and the business. Because of his age, education and business experience, Robert was thought to be the most qualified of the four brothers to head Cataract.

At some point, Robert became the president of Cataract, and he appointed Larry J. Villani as vice-president, Kurt M. Villani as secretary and James M. Villani as treasurer. On Federal income tax returns filed by Cataract for the fiscal years 1981, 1982 and 1983, petitioners were identified as corporate officers, and each of the four brothers was shown as a 25 percent shareholder of Cataract. All four brothers had authorization to sign Cataract bank checks. Cataract never held board meetings and apparently no resolutions were passed to appoint officers or issue stock. Rather, decisions regarding corporate office and stock ownership were made by Robert in consultation with Guido.

Before and during the assessment period, Robert was in control of the financial affairs of Cataract and was responsible for administration, computerizing operations, personnel, credit, and the corporation's relationships with its bank, its wholesale suppliers, its accountants and its lawyers.

With his father's approval, Robert carried out plans to expand Cataract. At its height, Cataract had approximately 60 to 70 employees in two stores and gross sales of approximately

¹Robert testified that he made the decision to incorporate Cataract in or about 1976. This testimony is clearly erroneous.

\$6 million per year. Robert hired several individuals who worked in the general office and helped him to operate the corporation, including: Carl J. Andrews, comptroller; David Koch, hardware manager and purchaser; Gail Villani (Kurt's wife), in charge of accounts payable; Susan Scarpone, lumber purchasing; and Tony Genoa, office manager. These individuals worked in the Cataract administrative offices on the second floor of the retail store building located in Niagara Falls.

Robert placed Larry in charge of the Niagara Falls retail store; Kurt was made responsible for sales to contractors and home builders; and James was assigned to work in the mill which produced customized wood products. He was later given responsibility for advertising. The three younger brothers were not assigned any responsibilities related to overall management of the corporation, finances, legal affairs, personnel, etc. Robert determined salary levels for each brother, and there is no evidence that the corporation ever distributed profits or dividends to any of the brothers.

As the brothers explained it, because of his position as head of the family (Robert described himself as "almost like a second Dad" [Tr. p. 436]) Robert had complete authority to operate Cataract as he saw fit, set his brothers' salaries, and assign duties and responsibilities to the brothers. The brothers were raised not to question their father's authority; consequently, when their father placed Robert in control of the business, they did not question Robert's authority.

Cataract's books of account were maintained by computer. Cataract had a point of sale system which meant that every sales transaction was entered on a computer which used that information to maintain records of all accounts, including sales, accounts receivable, inventory, general ledger, etc. The only account not maintained on this computer system was payroll. Sales tax returns were prepared from information taken from the computer records. Cataract did not have a sales tax accrual account.

Cataract's primary bank account, and only checking account, was with M & T Bank. The accounts payable clerks prepared checks and placed them on Robert's desk for his review

and signature. If he was not available, he would direct Carl Andrews to bring a check to one of the brothers to sign; however, he never allowed any of the brothers to sign checks for Cataract without his explicit permission or direction.

Generally, the only documents signed by any of the younger brothers were signed at Robert's direction. Very often, the brother signing the document did not even read the document in question, since they all trusted Robert to do what was best for the family and the business. Of the brothers, only Robert had any education beyond high school. In addition, Kurt has a learning disability which made it difficult for him to read with comprehension. There are considerable differences in age between Robert and his brothers. He is 7 years older than his next oldest brother, Larry, and 16 years older than his youngest brother, James. Under cross-examination, Larry Villani explained the relationship between Robert and his younger brothers as follows:

Q: "... so how did it come to pass that the only person ever entitled to make a decision in this whole business was your brother?"

A: "It was my father's wish."

Q: "And did he, when did he express this wish to you?"

A: "I don't recall the year. It had to do in the seventies"

Q: "And what, how did he express it to you? Can you tell me?"

A: "Just that, that we were hard workers, is what my father always told us. We did what he always asked us to do, and we worked diligently for the company and that my older brother was, had gone to school, and that he understood the financial end of the business; accounting, he knew how to read financial statements, he knew how to deal with attorneys and what-have-you and that's how it became. There's nothing else involved here." (Tr. pp. 491-492.)

The Division placed in evidence one sales tax return for the quarter ending November 30, 1984, signed by Kurt Villani. During the audit period, several sales tax returns were signed by Carl Andrews as comptroller of Cataract. Two other documents signed by one of the brothers were placed in evidence: a retail sales contract for the purchase of a truck, signed by Kurt, and a retail sales contract for the purchase of an automobile, signed by James. The automobile was James's personal vehicle. It was purchased by Cataract and insured as a vehicle

owned by Cataract in order to reduce James's cost of insuring the vehicle.

In 1983, Robert decided to open a store in Clarence, New York. A lease of a building in Clarence, signed by all four of the brothers, was executed on December 13, 1983. Kurt was placed in charge of overseeing the renovation and stocking of the new store. In addition, he was responsible for outside sales which involved building a customer base among contractors and home builders in the Clarence area. He continued working in Clarence after the store was completed. The store manager was an individual named Gary Spuller.

Robert attempted, but was unable, to negotiate a loan to finance the renovation of the Clarence store and the purchase of inventory. As a result, Cataract suffered a severe cash flow problem, and by the summer of 1984, Cataract was being administered by the special loans department of M & T Bank.² The bank extended a line of credit to Cataract, secured by its accounts receivable, to help it meet its daily operational expenses. The amount of credit available on any given day was a product of the overall credit limit, cash on hand, and Cataract's accounts receivable. Each

morning at about 9:00 A.M., a loan officer contacted Robert Villani and told him the total amount of credit available to Cataract that morning and the total amount of all checks presented for payment that day. Usually, there was a shortfall of cash. Robert and Carl Andrews would then attempt to raise enough money to cover the checks offered for payment that morning. This would entail attempts to collect payments from contractors and other customers purchasing on credit, deposit of the previous day's receipts, and a calculation of any new accounts receivable which would increase the line of credit. After several hours of attempting to generate cash, Robert would contact the M & T loan officer to obtain a final accounting. If Robert had not raised enough money to cover all checks and was unsuccessful in persuading the loan officer to increase the line of credit, he made the final decision as to which checks were to be honored and

²Cataract's sales tax liabilities stem almost entirely from the period beginning in the summer of 1984.

which were to be returned to the payee.

The Clarence retail store was opened for business in the summer of 1984. In November or December 1985, there was a fire which caused extensive damage to the store and inventory. Cataract claimed approximately \$400,000.00 in damages. Robert and Carl Andrews attempted to obtain an advance from the insurance company based on this claim, but they were unable to do so. Consequently, Cataract suffered even more financial distress which finally led to its filing a petition in bankruptcy.

As Cataract's financial condition deteriorated, Robert's control over corporate finances became tighter. M & T Bank insisted that Robert act as the sole liaison between Cataract and the bank and be responsible for all negotiations and decisionmaking. Robert attempted to control all purchasing, and he did control all payments to creditors. At some point, he travelled to Pennsylvania to demand that Cataract's second largest creditor, American Hardware, not accept any purchase orders from Cataract without Robert's prior approval of the order.

Several employees had authority to purchase materials for sale including David Koch, Susan Scarpone, Larry Villani, Kurt Villani and other managers. Purchases over \$500.00 had to be cleared through Robert. Payments of purchases were controlled by Robert. Because Cataract was not paying its debts, suppliers became unwilling to extend credit and, consequently, to accept orders. This led to arguments and discussions among the various managers with regard to which suppliers should be paid. All of the brothers participated in those discussions, but Robert always made the final decision regarding who was to be paid and who was not.

Although the financial condition of Cataract was precarious from the summer of 1984, each petitioner denied that he was ever told the true state of affairs. Each one testified that Robert did not discuss Cataract's financial affairs with him. Larry stated that he was assured by his brother that any problems were temporary and that he, Robert, was in control of the situation.

Cataract filed a voluntary petition in bankruptcy under Chapter 11 in September 1986.

By October of 1986, M & T Bank repossessed substantially all of Cataract's assets and took control of the business. Robert Villani announced the bankruptcy and M & T's repossession at a meeting of all employees held in October 1986. Until that meeting, Larry, Kurt, and James Villani did not completely understand the gravity of Cataract's financial situation and did not know that Cataract had filed a bankruptcy petition.

M & T Bank continued operating Cataract for several months after its takeover. Bank employees selected those individuals who were to remain in Cataract's employ and those who were to be dismissed. Robert, Larry and James Villani were retained as was Gail Villani. Kurt did not work for Cataract after October 1986. In the beginning of December 1986, the retail business was closed altogether, and all employees except Gail Villani were dismissed. Gail's primary duties were to assemble information for bank employees and to attempt to collect accounts receivable. She was dismissed at the end of January.

Cataract filed sales tax returns for the period December 1, 1984 through February 28, 1986 without remittance of the tax shown as due on those returns. Robert Villani met with representatives of the Division on several occasions to discuss these tax delinquencies. Gerald Staub, a tax compliance agent present at those meetings, stated his belief that Larry and Kurt were also present at one or more meetings. On October 24, 1989, Mr. Staub testified at a hearing which was held to determine whether petitions filed in this matter were timely. At that hearing, he testified as follows: "I met with three brothers and a controller [sic] once and at least two brothers and a controller [sic] one other time." (Tr. p. 62.) He was asked to identify the brothers present at these meetings and stated: "The only brother I can be sure of is --." This sentence was never completed. Larry and Kurt denied being present. Gail Villani identified the individuals attending those meetings as Robert, Carl Andrews, Cataract's accountant Frank Di Dario, and Tony Genoa. Carl Andrews stated that the meetings were attended by Robert, himself and another accountant, Bill Kearney. He did not believe that any of the other brothers attended these meetings but could not remember with certainty. Mr. Staub testified that he was told by Robert Villani that all four brothers had an equal voice in the running of Cataract.

In July 1986, the Division began a sales tax field audit of Cataract for the period September 1, 1983 through August 31, 1986. In his workpapers, the auditor identified Robert Villani and Carl Andrews as the persons assisting in the audit.³ Larry, Kurt and James are listed as corporate officers on the "Sales Tax Audit Report Information Sheet", but they are not mentioned in any other portion of the audit report. In connection with the audit, Robert signed a consent to extend the period of limitations for assessment of sales taxes and an audit method election form.

There is a factual dispute with regard to the degree to which Kurt and Larry participated in the audit; consequently, it is necessary to review the auditor's testimony and the responding testimony of petitioners' witnesses in some detail. The auditor's notes indicate that he was in the field, apparently at Cataract's offices, on seven occasions in September, four in October, and five in November. He testified that he was aided in the conduct of the audit by Larry, Kurt and Gail Villani. He also stated that Larry and Kurt were working in the Cataract retail store during the entire time that the store was operating. In addition, he indicated that he saw all four brothers in the store in December 1986.

Kurt testified that he was instructed by Robert to provide the auditor with whatever information he needed. When asked for information, Kurt would either go to the person in charge of that area of recordkeeping, retrieve the requested documents and give them to the auditor or direct the auditor to the requested documents.

Both Gail and Kurt Villani testified that Kurt was not employed by Cataract after M & T Bank took control in October 1986. Gail testified that Kurt was not present in Cataract's offices after that time.

The auditor stated that James did not participate in the audit in any manner. Larry's only role in the audit was to provide the auditor with information on exempt sales and exemption

³Mr. Andrews could not remember participating in the audit in any fashion.

certificates.

The auditor's notes indicate that he was at the offices of Cataract on December 9, 1986; December 17, 1986 and December 18, 1986. He testified that all four brothers were still working in the store on those dates and that the store was still operating (Tr. pp. 591-592); however, his notes indicate that "M & T Bank closed business on [December 9, 1986]". Gail Villani testified that M & T Bank closed the Cataract store at the beginning of December 1986 and that she was the only former Cataract employee on the premises after the beginning of December. She denied that any of the brothers were at Cataract's offices on December 17, 1986 or December 18, 1986.

The audit report contains the following statement:

"At the conclusion of the audit, the schedules and workpapers were reviewed with Robert Villani, President of the corporations. He indicated that he will research all areas of discrepancies and will try to gather additional information. However, since the vendor has filed bankruptcy and M & T Bank was in the process of liquidating the assets, AU-16's were issued and mailed to the corporation and each of the responsible officers on December 23, 1986. The vendor was advised of his protest rights and given TAB petitions."

Although the notices of determination were issued on December 23, 1986, the auditor's notes indicate that he continued to work on the case through January 1987. Entries for January 5, 21, and 27 show that the auditor worked on the case in his office. There are no entries in the auditor's log that indicate that he met or spoke with representatives of Cataract after December 18, 1986. The auditor's log indicates that he spent the entire day in the field on January 26, 1987. His handwritten entry for that date states: "Reviewed add'l info". He testified that he met with Larry, Kurt and Gail Villani on January 26, 1987, in the offices of Cataract, to discuss additional information needed for the audit. Gail Villani testified that she was present in the Cataract offices in late January when the auditor stopped in to request additional documents. She stated that an employee of M & T Bank was also on the premises at that time. However, it was her testimony that the meeting with the auditor was accidental and not previously arranged and that neither Kurt nor Larry were present. She stated that only bank employees had access to Cataract's offices at that time and that she only went to the offices when a bank representative

was present to let her in.

Kurt Villani signed a letter resigning as an officer of Cataract as of June 19, 1984. His resignation came about as a result of an argument between him and Robert. Kurt felt that he was not being given sufficient authority and control despite his brother's protestations that all the brothers were owners and officers of Cataract. He expressed his opinion that his status as an officer of Cataract was a sham. After consulting with an attorney, Kurt resigned as an officer. Robert then fired Kurt, but after several weeks Robert was persuaded by his father to rehire him. Kurt continued to appear on documents filed by the corporation as a corporate officer.

All of the brothers denied being aware of the financial condition of Cataract during the assessment years. They each stated that Robert never discussed the financial affairs of the company with his other brothers; that they did not know each other's salaries; that they had no authority to hire or fire employees; and that they made no decisions regarding the overall management and supervision of the corporation.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as:

"any officer, director, or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564).

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an

officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Cohen v. State Tax Commn., *supra*, 513 NYS2d 564, 565; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of D & W Auto Serv. Center, Tax Appeals Tribunal, April 20, 1989).

Petitioners were all corporate officers, shareholders and signatories on the corporate bank accounts. They worked for the corporation and thus derived an economic benefit from it. Despite these indicia of corporate responsibility, each petitioner claims that he was not responsible to act for the corporation in complying with article 28, because he lacked authority and control to insure that taxes were paid. The Division claims that petitioners had authority to act for the corporation, but rather chose not to exercise that authority. Furthermore, the Division argues that the testimony offered by petitioners was contradictory, lacked credibility, and was disproven by the Division's own witnesses. Because the Division claims that little or no weight should be given to petitioners' evidence, I begin this determination by attempting to resolve some of the factual disputes between the parties.

B. Each petitioner's degree of authority and responsibility within the corporation was somewhat different. Larry Villani was responsible for over-the-counter sales at the Niagara Falls store. Although he was in charge of managing that store, Robert always retained the ultimate authority over all financial and personnel decisions related to the store. The only documents in evidence signed by Larry were the original incorporation certificate (signed in 1973) and the lease guarantee for the Clarence store (signed by all four brothers). His only role

in the audit of Cataract was in providing exemption certificates to the auditor. Kurt Villani appears to have had a somewhat broader range of responsibilities. He was generally responsible for sales to contractors and home builders, and he was placed in charge of the Clarence store. Kurt signed one sales tax return, and he was directed to work with the auditor in providing requested documents and information, especially in the area of accounts receivable. Kurt resigned as a corporate officer in June 1984, although he continued to be identified as a corporate officer after that date on documents filed by Cataract. James Villani had no managerial or supervisory authority. He worked in the lumber mill where custom orders were filled.

The evidence establishes that Robert Villani had complete control of Cataract during the assessment period and that his younger brothers had only that managerial, administrative, supervisory or financial authority delegated to them by Robert. Three disinterested witnesses who worked for the corporation during the assessment period (Carl J. Andrews, Gary Spuller and David Koch) corroborated that Larry, Kurt and James lacked the authority to hire and fire employees, to decide which creditors were paid and which were not, and to authorize the payment of debts. Robert Villani testified that none of the brothers could sign a check or pay a creditor without his authorization. Mr. Andrews credibly testified that from the summer of 1984 M & T Bank refused to communicate with anyone except Robert Villani and specifically insisted that Robert be the sole person in charge of Cataract's finances.

To discredit petitioners' evidence, the Division offered the testimony of a tax compliance agent and an auditor who were involved in these assessments. Their testimony was intended to support the Division's contention that the younger brothers did exercise control of Cataract during the assessment period. These witnesses offered testimony which contradicted certain statements made by petitioners. At a hearing held in 1989 to determine the timeliness of the petitions, Mr. Staub testified that three of the four brothers were present at one or more meetings at which Cataract's sales tax liabilities were discussed. He did not identify the brothers present. Upon cross-examination at a later hearing which specifically dealt with the

issue of corporate officer responsibility, Mr. Staub seemed less sure of the identify of the persons attending the meetings; however, he agreed that James was not present. Kurt and Larry denied that they were present at such meetings, and Gail Villani identified the persons attending those meetings as Robert Villani, Carl Andrews, Robert Di Dario (Cataract's accountant) and Tony Genoa. Carl Andrews recalled attending meetings with the tax compliance agents and identified himself, Robert Villani and Bill Kearney (an accountant) as Cataract's representatives. He did not recall any of the other brothers attending these meetings, but he could not say with certainty that they had not. In sum, the evidence does not establish with certainty whether any of the younger brothers did or did not attend the tax compliance meetings.

In his testimony, the Division's auditor stated (1) that Larry and Kurt provided him with information and documents throughout the course of the entire audit; (2) that the Cataract store was open throughout December and that he observed all four brothers working in either the store or office during that time; and (3) that he held a closing meeting at the offices of Cataract attended by Larry, Kurt and Gail Villani. In specific instances, the auditor's testimony is called into question by other evidence in the record. The auditor's handwritten log shows that "M & T Bank closed business on [December 9, 1986]". His log shows that he spoke with the "vendor" on December 17, 1986 and December 18, 1986 to discuss the audit results, and the audit report identifies the person with whom he reviewed the audit schedules and workpapers as Robert Villani. Since the store was closed on December 9, 1986, it is unlikely that the auditor saw Larry, Kurt or Jim working in the store or discussed the audit with them on these days in December. Moreover, the notices of determination were issued on December 23, 1986, a fact consistent with closing interviews being conducted with Robert on December 17 and 18. There is no indication in the audit report that the auditor met with any of the petitioners after that date. His log indicates that he was in the field on January 26, 1987 where he "reviewed add'l info". There is no indication that he met with Kurt, Larry and Gail Villani on that date. If he did meet with them and discussed the audit results, whether by accident or design, that meeting could have served little purpose, since the audit was completed by that date. Certainly, the meeting

cannot be characterized as a "closing conference". Viewing the evidence as a whole, I find credible Gail Villani's assertion that her meeting with the auditor was accidental, that Larry and Kurt were not present, and that the meeting was not in the nature of an audit closing conference. I do not find that this meeting has any material bearing on whether Kurt and Larry had a duty to act for the corporation during the assessment period.

The auditor's assertion that he was assisted by Larry and Kurt is consistent with other testimony. However, their degree of participation in the audit does not establish that they were actively involved in managing the corporation. The audit report indicates that Robert Villani and Carl Andrews represented Cataract during the audit. There is no mention of Larry, Kurt or James in that report. The auditor testified that Robert Villani directed him to certain individuals to obtain information with respect to specific aspects of the audit. There is no evidence that Larry did more than respond to requests for exemption certificates. Kurt was assigned by Robert to provide whatever information the auditor requested. In general, this took the form of locating documents or directing him to the appropriate location where invoices were kept. These interactions do not establish that Larry and Kurt exercised authority and control within the corporation. James did not participate in the audit in any manner.

On the whole, I find that the Division has attempted to attach more weight to the auditor's observations of and conversations with the three younger brothers than is merited. His limited observations are not sufficient to disprove testimony offered by petitioners. However, the Division does not carry the burden of proof in this proceeding. In order to successfully challenge the assessment against him, it was incumbent upon each petitioner to show that he was not an individual under a duty to act for Cataract in complying with the various provision of article 28.

C. The holding of corporate office is not in and of itself a sufficient basis upon which to impose personal liability for sales taxes found owing by a corporation (Chevlowe v. Koerner, supra). Likewise, the existence of some of the other factors enumerated above does not definitively resolve the issue of liability for sales taxes. Rather, the various factors provide a

framework for deciding the ultimate question, whether an individual had a "duty to act" for a particular corporation in complying with article 28 of the Tax Law (Tax Law § 1131[1]). In most instances, a putative corporate officer with an economic stake in the corporation will be found to be under such a duty to act (see, e.g., Matter of Martin v. Commr. of Tax & Fin., supra; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991; Matter of D & W Auto Serv. Center, supra). Exceptions have been found where the facts establish that the corporate officer has been precluded from acting on behalf of the corporation with regard to payment of sales taxes (e.g., Matter of Constantino, supra [where a majority stockholder prevented the petitioner from acting with regard to the financial and management activities of the corporation]; Matter of Stern, Tax Appeals Tribunal, September 1, 1988 [where the corporation's assets, including all of its financial records, were seized by a creditor]). In addition, the Tax Appeals Tribunal has recognized that in a large corporation with a complex corporate structure even an officer with an influential financial role may not be personally liable for sales taxes, because a finding that a person had a "duty to act" for a corporation must be premised upon a factual determination that the corporate officer had the authority to ensure that sales taxes owed by the corporation were paid (see, Matter of Roncolato, Tax Appeals Tribunal, August 15, 1991).

In essence, each petitioner is arguing that he was denied authority to insure that the corporation's sales taxes were paid by the nature of the familial relationship of the brothers. I doubt that Kurt and Larry Villani were as ignorant of the financial condition of Cataract as they claim to have been. On the other hand, I find entirely credible their assertion that they never questioned their older brother about his conduct of the business. Moreover, the weight of the evidence establishes that, as a practical matter, Larry, Kurt and James lacked the authority to act for Cataract. They exercised no more control than did other employees, and, in some respects, exercised less. None of them had a financial investment in Cataract. Other evidence of petitioners' lack of authority was their inability to hire and fire employees or to establish compensation of other employees; their ignorance of each other's salaries; and M & T Bank's exclusive relationship with Robert Villani.

Looking at the circumstances of each brother individually lends greater weight to the conclusion that none of them had authority to act for the corporation. Kurt's official resignation and unofficial reinstatement lends credibility to his claim that he was an officer in name only. All of the witnesses, including the Division's, confirmed that James Villani had no financial responsibilities at all. He did not participate in the audit in any manner; he was not in charge of any area of the business; and he had no responsibilities for sales or purchases. Larry's responsibilities were also limited. There is no evidence that he had authority over the financial affairs of Cataract.

The primary case relied on by the Division is distinguishable. In Matter of Pais (Tax Appeals Tribunal, July 18, 1991), the record contained no evidence that the petitioner, who was the president and a majority stockholder of the corporation, was prevented from exercising control over the corporation. The Tribunal found that there was evidence in the record that the petitioner could have exercised control but chose not to. Quite the opposite is true here. Petitioners have shown that they could not have exercised control over the corporation because they lacked the authority to do so. Since they did not have authority to ensure that Cataract's sales taxes were paid, they also did not have a "duty to act" for the corporation in complying with article 28.

D. The petitions of Larry J. Villani, Kurt M. Villani and James M. Villani are granted, and the notices of determination and demands for payment of sales and use taxes issued on April 8, 1986 and December 23, 1986 are cancelled.

DATED: Troy, New York
October 29, 1992

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE